



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA OF KISII**

**Civil Case 183 of 2008**

**ANDREW MOKAYA ANGWENYI..... PLAINTIFF**

**-VERSUS-**

**CO-OPERATIVE BANK OF KENYA LTD.....DEFENDANT**

**RULING**

On 16/12/2008 the applicant/plaintiff filed this suit against the respondent/defendant seeking injunction in respect of his parcel of land no. Kisii Town/Block 11/117 in respect of which the notification of sale had been issued by the respondent for alleged outstanding loan. With the suit was filed a Chamber Application under *sections 3A and 63(c) of the Civil Procedure Act and Order 39 rules 1 and 2 of the Civil Procedure Rules* for interim injunction until the suit was heard and finalized. An *ex parte* temporary injunction was issued on 18/12/2008 to await *inter parte* hearing. On the day of hearing the applicant was represented by Mr. Bosire who presented the application. The respondent or counsel did not attend, although a Replying Affidavit had been filed. The court will consider the Supporting Affidavit and annexed documents and also the Replying Affidavit and annexed documents.

It would appear from the evidence on record that in October, 1993 the applicant obtained a loan of Kshs. 5 million from the respondent. The loan was secured by a charge registered on the applicant's land parcel *no. Kisii town/Block 11/117*. There were two further advances to the applicant by the respondent on the title. There was one on 22/9/94 of Kshs. 5 million and another in 2004 of Kshs. 4 million. By 4/6/2008 the respondent was demanding Kshs. 13,027,874/85 from the applicant. Messrs. Spotlight Intercepts Kenya Limited were instructed to advertise and sell the property to realize the amount after the issuance of statutory notice. It is at that point that the applicant filed the suit and application. There had been earlier attempts to sell the property after the applicant went into default.

The applicant's case is that following discussion between the parties, the respondent in 2005 waived the entire loan following which the charge was discharged and the original Certificate of Lease released to him. This is what is stated in paragraph 4 of the Plaint:

*"4. The Plaintiff received money from the Defendant on two other occasions using the same title held as security until 14<sup>th</sup> November, 2005 when the charge was duly discharged and the original certificate of lease released back to the plaintiff after discussions with the defendant who waived the entire loan balance at the time."*

The applicant was therefore surprised to see the respondent still demanding the loan. It is clear the applicant is not saying he repaid the entire loan that was advanced. He annexed a copy of the Certificate of Lease (AMA-3) in which it is endorsed that on 14/11/2005 the charge was discharged. In the Statement of Defence and Replying Affidavit, the respondent was expressing shock that the applicant had obtained the Certificate of Lease and that the charge was discharged. According to the respondent the

loan is still outstanding and that there was no time it was waived. It was stated that for along time the sale of the land has been postponed to indulge the applicant owing to long standing relationship between them. The respondent annexed Certificate of official Search (JM6) dated 30/1/2009 showing the land was still charged to the bank. The respondent alleges fraud and or forgery on the part of the applicant and the land registry. The respondent stated it has never executed any Discharge of Charge over the land.

The applicant did not produce any letter from the respondent to him waiving the loan. It has been noted in the foregoing that the loan was not fully repaid. Issue whether or not there was waiver will await trial and it is on it that the case will turn. At this stage, and on the available material, the court cannot say the applicant has demonstrated a *prima facie* case.

The issue of discharge can only follow that of waiver. If there was no waiver there could not have been discharge. The applicant holds the Certificate of Lease to show the title was discharged. The respondent has search from the lands office showing the title is still charged.

The applicant has not stated he would be willing to repay the loan if the case is decided against him. On the facts, the balance of convenience would tilt in favour of the respondent which advanced a facility to the applicant who did not pay.

I dismiss the application. The *exparte* injunction is lifted. The respondent did not attend and cannot be paid costs of the application.

Dated, signed and delivered at Kisii this 10<sup>th</sup> Day of November, 2009

**A.O. MUCHELULE**

**JUDGE**

**10/11/2009**

**Before A.O.Muchelule-J**

**Mongare court clerk**

**Mr Leteipa for Mr. Bosire for plaintiff**

**COURT: Ruling in open court**

**A.O.MUCHELULE**

**JUDGE**

**10/11/2009**